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TAGS: BL ECON ENVR KDEM PGOV PREL PHUM PINR
SUBJECT: BOLIVIA'S NEW CONSTITUTION: MAS WINS

Classified By: EcoPol Chief Mike Hammer for reasons 1.4 (b) and (d)

11. (C) Summary: On October 21, President Evo Morales announced that his Movement Toward Socialism (MAS) party and the opposition had reached a compromise to update the text of the MAS draft constitution, which will go to a national referendum on January 25. Some of Evo's hard-core MAS supporters protested the significant changes to the constitutional text and Evo's promise not to run for a third term, while regional opposition leaders accused the national opposition of giving in too easily. Post has obtained a credible copy of the new draft constitution and reviewed the changes. While the opposition did achieve some gains, the draft constitution empowers the central government at the expense of the departments (a loss for the regional opposition). Some vague sections of the text have been clarified, but the final draft still leaves questions on key issues, including presidential term limits, land reform, and foreign investment. Perhaps most importantly, a change to senatorial election by proportional representation may lead to a MAS takeover of both houses of congress and ultimately the ability to modify the constitution at will. End summary.

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Big-Ticket Items
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12. (C) Term limits: While eleventh-hour negotiations between the MAS and opposition parties apparently led to an agreement that Evo would stand for only one more term (i.e. through 2014), it should be noted that the relevant part of the Constitution, Article 168, has not been updated from the December 2007 draft. Under the "Transitory Provisions" at the end of the text, new language was added, which states "Terms in office before this text comes into force will be taken into account to compute new terms in office." The opposition feels this addition will limit Evo to one more term. However, in light of recent comments from Development Minister Carlos Romero that "Reelection, for now, includes only one term," as well as the significant potential for a MAS takeover of both houses of Congress (and with this the subsequent ability to modify the Constitution more easily), some doubt that Evo will honor this agreement.

¶3. (C) Land reform: In what could be one of the biggest gains for the opposition, Article 399 has been updated to state that any new limits on the size of agricultural land holdings would apply only to lots acquired after the new Constitution enters into force. At first glance, this change would appear to provide significant legal cover for property owners seeking to maintain large properties, especially in the eastern (opposition) part of the country, or "Media Luna." The opposition also added an assurance in Article 57 that the government would not expropriate any urban land holdings, and struck the prior vague allowance for expropriation when property was "not fulfilling a social function". However, the issue is not settled. Article 57 also specifies that the government has the ability to expropriate rural land holdings for "public need or utility" when necessary, a potentially large loophole. (Note: Land redistribution has long been a plank in the MAS platform, and hard-core MAS supporters complained at the loss of the "social function" clause. Assuming approval of the constitution in the January referendum, we may see significant pressure on Evo to seize land. End note.)

¶4. (C) Control of Congress (to MAS): A significant change appears to have been made in the composition of the Senate, favoring the MAS. Article 148 has been changed to increase the number of Senators from 27 to 36 and to allow for the election of Senators via proportional representation. The expansion of seats and the change from a winner-takes-all system could well augur a MAS takeover of the Senate and thus control over both houses of congress (now to be called the Plurinational Legislative Assembly). The opposition's past ability to eke out wins in five of the nine departments gave them control of the Senate and the ability to check, to some degree, implementation of the MAS agenda. Proportional representation could lead to a landslide of MAS Senators from the western half of the country and the election of several more from the Media Luna, leaving opposition parties out in the cold. Given that the new draft allows the constitution to be modified by a two-thirds vote of Assembly members present, this change could enable the MAS to modify the constitution at will. (Note: the opposition did manage to modify the text regarding constitutional amendments--previously a simple majority in one house of congress was all that was necessary to amend the constitution, and would have given the MAS the almost-instant ability to make any changes it wished. With the change to proportional representation, however, MAS may achieve a two-thirds majority, making the change moot and the end result the same. End note.) Note also that Articles 147 and 148 state that not only will there be "equal participation" between men and women in the Congress, but that there will be "proportional participation of indigenous nations and villages."

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State Control of the Economy
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¶5. (C) Hydrocarbons: MAS negotiators held firm in their goal to insert the state squarely into the economy and to keep the executive branch in control of the hydrocarbon sector. Foreign companies are dissuaded from participating in the hydrocarbon industry. Left unchanged, Article 366 states that all foreign companies involved in the hydrocarbon industry must submit to government sovereignty. The government will not recognize the authority of foreign tribunals, arbitrators, or external jurisdictions, and will not allow companies to make diplomatic claims or requests. Per Article 359, production of hydrocarbons is an "inalienable right of the central government". All income from commercialization of hydrocarbons is the property of the state. While the Constitution does allow partnerships with foreign companies, the effect of this language will likely deter foreign investors wary of being caught without any exit strategy or recourse to international arbitration.

¶6. (C) Bilateral treaties: The portions of the text devoted to rejection of imperialism and neo-colonialism not only strike a populist tone, they also contain details that will

further deter foreign investment. Article 320, left untouched from the initial draft, states that "Bolivian investment will be prioritized above foreign investment." All foreign investment will be under Bolivian authority, and the state will not accept conditions on the part of other states, banks, or financial institutions. These terms conflict with agreements such as the U.S. - Bolivia Bilateral Investment Treaty, which requires equal treatment for both parties.

17. (C) Utilities: Under the new Constitution, access to water and sewerage would be declared fundamental human rights, which the government would deliver to all Bolivians (see Article 20), and which may not be subject to concessions or privatization. This could lead to significant increases in infrastructure costs (and potentially lawsuits demanding access) at a time when dropping hydrocarbon prices may not support new spending. If handled incorrectly, this element of the constitution could lead to uprisings and demands from rural and poorer areas, MAS strongholds.

18. (C) Article 124, which deals with acts of treason, includes a clause regarding "acts against natural resources". In the December 2007 draft, a more broadly-worded clause stated that whoever realized acts that would "dispose of natural resources belonging to the social ownership of the Bolivian people in favor of foreign businesses, persons, or states" would be considered a traitor. This clause has been modified to apply to those who "violate Constitutional rules against natural resources," which, while still vague, does not seem as easily applied to Bolivians doing business with foreign companies. (Note: One of the MAS's complaints against ex-President Gonzalo "Goni" Sanchez de Lozada is that he profited off of sales of mines previously belonging to the state. The government is working on an extradition petition for Sanchez de Lozada. End note.)

19. (C) Domestic financial policy: In a subtle but potentially significant update to Article 327, which deals with the Central Bank and financial policy, the Executive Branch was granted more leeway to meddle in monetary policy. It appears likely the MAS struck the following text "(the Central Bank) has autonomy in its administrative and technical services" to increase their sphere of influence in financial policy matters. The director of the Central Bank is already appointed by the President, and this change could signal further state involvement in this sector.

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Autonomy Sections: Heavily Re-written, But For What?
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10. (C) The sections on autonomy were extensively changed during the final compromise negotiations, but to little effect. The central government retains control of taxation, land titling, hydrocarbon production in all aspects, and distribution of the Direct Hydrocarbon Tax (IDH). The powers granted to the departments do not match those in the autonomy statutes passed by Santa Cruz, Beni, Pando, and Tarija. The departments are not privileged entities and do not have legal standing above the other autonomous areas, being instead held equal to indigenous territories and municipalities (Article 276). (Note: The draft constitution also states that any power not designated specifically reverts to the central government (Article 297), the reverse of the U.S. Constitution. End note.) One outcome of this leveling of the powers of autonomous areas could be a power vacuum into which the civic committees and similar groups will insert themselves. Post-compromise protests by the regional opposition stem from the lack of power granted to the departments in the final draft.

11. (C) As part of the new draft, departmental, municipal, and indigenous autonomous areas may create and administrate taxes, but only if the tax is not analogous to central government taxes, which does not leave much to tax beyond tourism and infrastructure. A new Framework Law on Autonomies and Decentralization (see Article 271) will be written to regulate and coordinate the different types of autonomies.

This Framework Law is expected to state that any other law passed by the departments regarding autonomy is void, reasserting the central government's control.

¶12. (C) The opposition was successful in nullifying much of the impact of the new "Regional" autonomy section of the Constitution. The Regional autonomy area may have been introduced by the MAS to mollify Chaqueños, many of whom have agitated for greater recognition for the Chaco region, which spans several departments. However, the opposition successfully modified Article 280 to state that a regional autonomous area cannot span two departments, keeping any regional autonomous areas subsumed inside the departments. The regional autonomy area is also limited in the final draft to playing a vague role of primarily "planning and facilitation." However, the regional autonomy level may still offer some benefits to the city of El Alto: in the final draft, new language confers regional autonomy status on urban areas with populations above 500,000 people. While the direct benefits of receiving "regional" status may be nebulous, it is a way to offer recognition to La Paz's poorer neighbor.

¶13. (SBU) In a change to the final draft, the leaders of the Departments are now to be called "Governors" instead of Prefects (see Article 279).

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Freedom of the Press
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¶14. (C) The final draft appears to have addressed some of the concern raised by media groups regarding suppression of free speech. Negotiators eliminated language in Articles 106 and 107 that had assured respect for free expression "in accordance with the principle of responsibility," a vague and troubling clause given President Morales' proclamation that the media is his "main enemy." Instead, the Constitution calls for "auto-regulation," perhaps signaling the establishment of an industry group. It remains to be seen whether this will be an effective compromise or an ultimately damaging inclusion, since state media would presumably be included and self-censorship may result.

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Judicial Reform
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¶15. (C) The final round of negotiations reversed some of the changes that the December 2007 draft would have been made to the judicial system, especially with regard to the impact of "social groups" in nominating members of the new Justice Council and the Constitutional Tribunal. The Justice Council, which will have oversight responsibility of the judicial system, was to be populated by members nominated by undefined "social groups," which potentially could have included groups such as the Coca Growers Union or others sympathetic to the MAS cause. Instead, Article 193 was changed, presumably by the opposition, to ensure that the National Assembly will nominate the Justice Council members. Article 197 was amended to change indigenous representation in the Constitutional Tribunal from "parity representation" to simply an undefined "representation". Also, the requirements to be on the Constitutional Tribunal, in Article 199, were toughened. Previously an indigenous representative would not need any specific experience to be on the Constitutional Tribunal; now all members must have eight years of experience in either constitutional law, human rights law, or administrative law. Previously "social groups" were responsible for nominating the members of the Constitutional Tribunal; the final text was modified to state social groups "can suggest" candidates (Article 199, II).

¶16. (C) The draft also creates a new wing of the judiciary, the Agro-Environmental Tribunal (Article 186). While likely intended to shift the balance of power in agricultural law from the Media Luna (where there is much more large-scale farming) to the national level where the MAS can have more

control, it will also create more bureaucracy and friction within an already understaffed and fragmented judiciary system.

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Indigenous Rights
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¶17. (C) Several new elements regarding indigenous legal rights and indigenous justice emerged in the final draft. First, new text effectively sanctions non-democratic "elections" in indigenous areas, which are to be monitored by the newly-created "Electoral Body." Article 191 was edited heavily and now clarifies that indigenous "community justice" applies to all members of the indigenous nation in question or to acts in the indigenous area. Article 15 makes clear that indigenous justice must adhere to the constitution, which specifically prohibits the death penalty, so that lynchings should not be confused with "community justice" norms. Last, any unanswered questions regarding indigenous rights are to be addressed in the forthcoming Law of Jurisdictional Demarcation, newly proposed in the

Constitution (see Article 192), which will "determine the mechanisms of coordination and cooperation" between the indigenous, civil, and agro-environmental jurisdictions.

¶18. (C) Economically, indigenous groups are granted several exclusive rights not granted to the departments, including the right to administer "renewable natural resources." While this would not include mining or hydrocarbons, it would include revenue from fishing and logging (Article 304). (Note: In allowing both traditional or "non-democratic" elections within indigenous areas and the "renewable natural resource" revenue streams mentioned directly above, the Constitution does grant indigenous groups more and different rights than other Bolivians. However, the opposition appears to have eliminated many of the other "special rights" mentioned in the earlier draft of the Constitution. End note.) New text protects prior investments by non-indigenous agents in indigenous autonomous areas (Article 30, #17), and also guarantees private property rights for landowners whose lots are located in new indigenous autonomous areas (Article 394).

¶19. (C) The final draft kept the requirement to speak at least two of the 37 official languages in order to work in a government position. An attempt to provide a five-year transition period for this requirement was defeated, according to a version of the Constitution with proposed changes tracked. Almost none of our contacts in the Ministry of Foreign Affairs speak an indigenous language, and it is unclear whether immediate enforcement of this new rule will displace much of the government's bureaucratic backbone.

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No Foreign Bases
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¶20. (U) Article 10 remains untouched, including a prohibition on the installation of foreign military bases in Bolivian territory.

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Human Rights
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¶21. (C) A new clause to Article 13 (likely added by the opposition) states that any international human rights treaties ratified by the National Assembly will prevail, even during periods of martial law, over conflicting passages in the constitution. Given the recent establishment of martial law in Pando, the opposition may have hoped to preserve a wider range of human rights protection in any future events.

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Comment
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¶22. (C) The compromise reached in Congress on the new Constitution is a huge win for President Morales. Even if under the spectre of thousands of armed Evo supporters, the lack of violence provided the democratic cover needed to avoid international scorn. Furthermore, Morales has delivered on his promise of a new Constitution while leaving the door wide open for his possible continued rule through 2014 and possibly beyond. The Constitution is almost assured passage, as the opposition that helped broker the compromise language is not in a position to mount a serious campaign against it, and may actually want to be seen as for its passage in order to gain its own "pro-change" credentials. The regionally-based opposition remains opposed to the proposed text, but it is weak and lacks the resources to mount a serious "No" campaign, while Evo already is engaged in promoting the "Si" vote.

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